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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION (MDL No. 2406)	**Master File No. 2:13-CV-20000-RDP** This document relates to all cases.

DEFENDANTS' RESPONSE TO PLAINTIFFS' JOINT MOTION TO SET CASE SCHEDULE

Defendants have proposed an efficient, common-sense schedule that allows the Court to decide class certification by January 2020 and hold a single trial on all issues in 2021. By contrast, Plaintiffs propose a piecemeal schedule that contemplates multiple class certification and trial phases for several more years into the future. Plaintiffs' proposal should be rejected because it is inefficient, prejudicial and contrary to law.

First, Plaintiffs' schedule is inefficient. Plaintiffs propose to simultaneously brief merits and class certification, which could require the parties to relitigate their class-dependent motions following the Court's class certification ruling. For example, under Plaintiffs' schedule, a summary judgment motion based on no classwide impact must be filed before class certification is issued. That makes no sense. Moreover, Plaintiffs themselves cannot agree on an approach. Subscriber

Plaintiffs seek two trials to bifurcate liability and damages that would extend out to 2023, while Provider Plaintiffs propose a single trial.

Second, Subscriber Plaintiffs' proposal is highly prejudicial. As an initial matter, Subscribers' assertion that this bifurcation is required by insufficient data is a pretext; indeed, even Provider Plaintiffs acknowledge they have enough data to proceed. Rather, Subscriber Plaintiffs propose this schedule to delay as long as possible adjudication of the significant problems with class certification on damages. Subscribers should not be allowed to use bifurcation to shirk their burden of proving classwide damages.

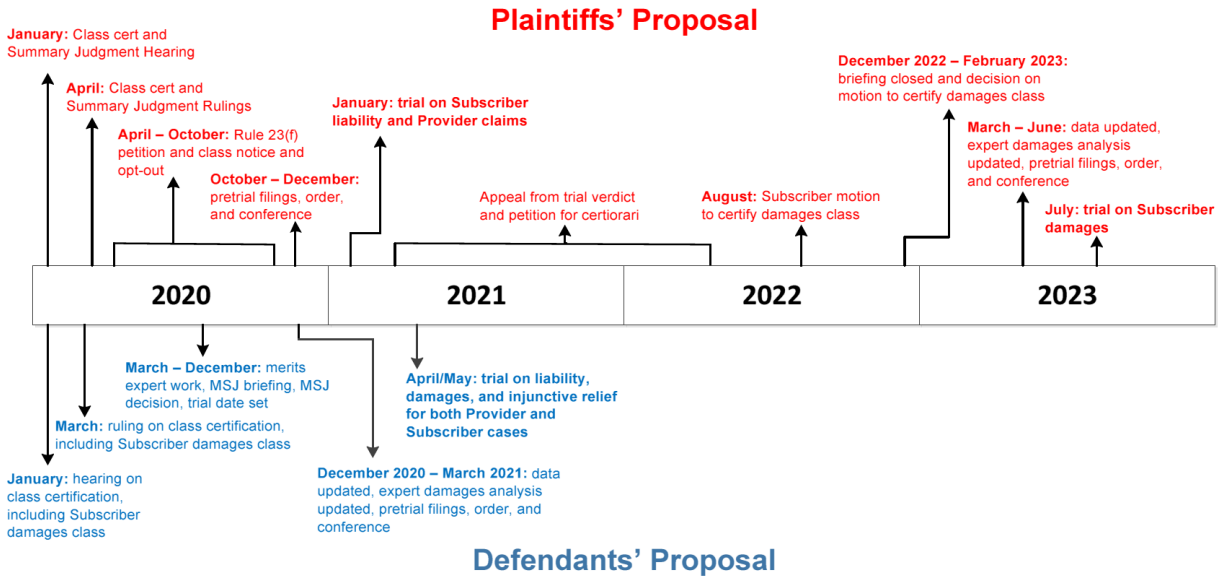
Third, Plaintiffs' proposals contravene established law in several respects. Plaintiffs' proposal to bifurcate liability and damages would run afoul of the Seventh Amendment's Reexamination Clause by requiring two different juries to consider the interwoven issues of impact and damages. Further, as discussed in Defendants' status report (and confirmed by the very cases Plaintiffs cite), Plaintiffs' schedule invites a violation of the rule against one-way intervention.

Fourth, Plaintiffs are not helped by Providers' citation to articles discussing hospital closures. Those articles are inapposite, and the conclusions that Plaintiffs seek to draw from them are incorrect in any event.

I. PLAINTIFFS' PROPOSAL IS INEFFICIENT.

A. Plaintiffs' Proposed Schedule Is Significantly Longer Than Defendants' Proposal.

Plaintiffs wrongly claim that Defendants are seeking indefinite delay in this case. Subscriber Pls.' Joint Mem. of Law in Supp. of Mot. to Set Case Sched., Dkt. 2381 ("Pls.' Br.") at 1. In fact, as shown in the timeline below, it is *Plaintiffs* who would delay the resolution of this case until at least 2023:



This timeline demonstrates that Plaintiffs' schedule is significantly longer than what Defendants propose.[1] In order to mask this delay, Plaintiffs make a number of assertions about Defendants' schedule that are just wrong.

[1] Plaintiffs claim that a trial could occur in mid-2020 immediately following a decision on class certification. Pls.' Br. at 2. But this assumes that a trial would go forward while a Rule 23(f) petition is pending, and it also ignores the need to address class notice and opt outs before any trial. Accounting for these factors, a trial under Plaintiffs' proposal could not occur until January

Early Summary Judgment. Plaintiffs also wrongly assert that "Defendants want to wait until after class certification and a Rule 23(f) decision" to file any summary judgment motions, including a motion based on *Amex*. Pls.' Br. at 16. In fact, Defendants' proposal allows for early summary judgment motions that are not dependent on the Court's class certification ruling.[2]

Multiple Class Certification Proceedings. Plaintiffs assert that "[i]n response to a motion to certify an Alabama damages class from 2008 until the present, Defendants would likely argue that Subscriber Plaintiffs do not have the data for such a damages model and require Subscribers to undergo another round of class certification once that additional discovery takes place." Pls.' Br. at 12. According to Plaintiffs, this results in "hidden delay in the possibility of an entire second round of damages class certification that would need to be conducted before trial." *Id.* Wrong again. Defendants have never suggested that there would need to be multiple rounds of class certification briefing; to the contrary, Defendants' position—stated on the record in court—is that class certification should be decided on the current record and any data update would only be

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2021 at the earliest. And an Eleventh Circuit decision to review the class certification decision and hear a Rule 23(f) appeal would further extend this and other subsequent dates.

[2] Plaintiffs also claim that Defendants sought a stay during their 1292(b) appeal. Pls.' Br. at 7. That too is wrong. Defendants never sought a stay—and in fact committed to the Court that the parties would continue to litigate various issues throughout the pendency of the 1292(b) appeal. *See* Jun. 12, 2018 Telephone Hr'g Tr. at 5-6.

necessary for trial.[3] Instead, it is *Subscribers* who are angling for multiple class proceedings (and multiple trials). *See* Pls.' Br. at 12 ("[A]dditional structured data discovery *and damages class certification* would not occur until *after* exhaustion of all appeals on liability." (emphasis added)). As explained below, this is not only inefficient, it is also contrary to law.

Consistency With Court's Prior Orders. Providers claim that their proposal is "consistent with the Court's prior schedule." Provider Pls.' Submission on Sched., Dkt. 2380 at 2. They are again wrong. The Court's prior schedule did not require class certification and dispositive motions to be conducted simultaneously. *See* Third Am. Sched. Order, Dkt. 1567. In fact, in recent hearings, the Court has indicated that the parties and Court should first focus on class certification. *See* Jan. 15, 2019 Judge Proctor Hr'g Tr. at 14:8-9 ("[T]he next thing we need to really focus on is class certification."); *see also* Apr. 19, 2018 Judge Proctor Hr'g Tr. at 7:5-6 ("I'm not going to make you work on two tracks simultaneously.").

B. Plaintiffs' Simultaneous Briefing Schedule Is Unworkable.

Plaintiffs' proposal improperly requires the parties to engage in class certification and all summary judgment briefing simultaneously. That does not make sense. Certain dispositive motions will depend on the Court's class

[3] *See* Aug. 30, 2018 Judge Proctor Hr'g Tr. at 43:1-10 ("The record is perfected. Discovery is closed. Class cert can proceed on the basis of the record to date. . . . When we're getting ready for trial, that's when there should be a reasonable conversation about the scope and the timing of any update to structured data.").

certification ruling, and thus cannot be made until class certification is complete. For example, whether Plaintiffs can show impact across a given class is a summary judgment issue. *See In re Fla. Cement & Concrete Antitrust Litig.*, 278 F.R.D. 674, 682 (S.D. Fla. 2012) (impact is "an essential element" of an antitrust claim). But that issue can only be briefed (and the supporting expert work can only be done) after the parties know what class(es), if any, are certified. Indeed, it is common practice for courts to phase class certification and dispositive motion briefing, rather than to force the parties to do everything at once. *See* Defs.' Status Report, Dkt. 2379 at 3-4. Plaintiffs' cases are not to the contrary. *See* Pls.' Br. at 14.[4] Indeed, Plaintiffs' cases simply do not support courts *compelling* the parties to undertake the massive burden of briefing class certification and all summary judgment motions (along with related expert work and *Daubert* motions) at once.

[4] *See Villa v. San Francisco Forty-Niners, Ltd.*, 104 F. Supp. 3d 1017, 1020 (N.D. Cal. 2015) (although plaintiffs filed motion for summary judgment concurrently with motion for class certification, Court denied the summary judgment motion without prejudice based on one-way intervention principles); *In re: Disposable Contact Lens Antitrust Litig.*, 3:15-md-02626-HES-JRK (M.D. Fla.) (The original deadline to file motion for class certification was December 7, 2016, and deadline to file motions for summary judgment was set for December 22, 2017, over a year later. Dkt. 204); *Corcoran v. CVS Health Corp.*, 4:15-cv-03504-YGR (N.D. Cal.) (The original scheduling did not require simultaneous briefing of class certification and summary judgment, Dkt. 61, and no summary judgment motions were filed before the court's initial ruling on class certification. After the court denied class certification without prejudice, Dkt. 249, the defendants took the position that the court should decide their forthcoming motion for summary judgment *before* the plaintiffs' renewed motion for class certification. Dkt. 262 at 3.); *In re Domestic Drywall Antitrust Litig.*, 2:13-md-2437 (E.D. Pa.) (Initial scheduling order, which the parties submitted by agreement, addressed only summary judgment deadlines. Dkt. 171. Plaintiffs filed motions for class certification over a year after motions for summary judgment were filed. Dkts. 204, 431, 472.); *Cruz v. Am. Airlines*, 150 F. Supp. 2d 103, 110 (D.D.C. 2001) (no indication of defendants' objection to briefing schedule or order of ruling).

II. PLAINTIFFS' PROPOSAL IS PREJUDICIAL.

Although Subscriber Plaintiffs attempt to gloss over this fact, their proposal contemplates multiple rounds of class certification: one round on Subscriber liability and Provider liability and damages, and a second round on Subscriber damages that would occur *after* an initial trial and any appeals. *See* Pls.' Br. at 12 ("Pursuant to [Plaintiffs'] schedule, additional structured data discovery *and damages class certification* would not occur until *after* exhaustion of all appeals on liability." (emphasis added)). It is clear why Subscribers want to impose this nonsensical, drawn-out approach: they are going to have serious problems with class certification requirements on damages. For that very same reason, Defendants would be severely prejudiced if Subscribers are allowed to defer indefinitely a ruling on this critical issue.

Subscribers have previously recognized the importance of certification of a damages class. In response to a question from the Court in April 2018, counsel admitted that the "damages class . . . is obviously the thing that's most important to the class certification stage," and that the injunctive class is "much less significant" for class certification purposes. Apr. 19, 2018 Judge Proctor Hr'g Tr. at 68:9-16. Yet now Subscribers seek to certify a "liability only" class, relegating proposed certification of a damages class until 2023 or beyond. All that does is allow Subscribers to litigate this case *for years* under the false pretense that they may,

one day down the road, certify the critically important damages class. That would significantly prejudice Defendants by forcing them to defend a substantial portion of this case—through trial and even appeal—before Subscriber Plaintiffs are asked to show that they can do something as fundamental as establish damages through classwide evidence. That is wrong. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 n.21 (5th Cir. 1996) (cautioning against severing defendants' conduct from classwide harm in an attempt to "manufacture predominance through the nimble use of subdivision (c)(4)"); *Fisher*, 238 F.R.D. at 316 ("[C]ourts have emphatically rejected attempts to use the (c)(4) process for certifying individual issues as a means for achieving an end run around the (b)(3) predominance requirement."); *Holmes v. Cont'l Can Co.*, 706 F.2d 1144, n.10 (11th Cir. 1983) (cautioning (b)(3) should not be subverted by recasting and bifurcating every damages class suit into an injunctive (liability) class and then, later, a damages class).

Subscribers' newfound claim that they must delay certification of a damages class because of allegedly out-of-date data (*e.g.* Pls.' Br. at 11-13), must thus be seen for what it is: an excuse not to have to face one of the most significant hurdles in their case. *D.C. by & through Garter v. Cty. of San Diego*, No. 15CV1868-MMA (NLS), 2018 WL 692252, at *3 (S.D. Cal. Feb. 1, 2018) ("Courts often decline to certify a liability class where plaintiffs fail to show any [classwide] model for calculating damages" (internal quotation marks omitted)).

Subscribers should not be allowed to use creative scheduling to end-run around their obligation to prove their entire case—liability and damages—through classwide evidence. *See Fisher*, 238 F.R.D. at 316 (rejecting bifurcation of liability and damages and certification of a liability-only class and noting that "a class action *as a whole* [e.g., liability *and* damages] must satisfy the Rule 23(b)(3) predominance requirement" (emphasis added)); *Teggerdine v. Speedway, LLC*, No. 8:16-CV-03280, 2018 WL 2451248, at *8 (M.D. Fla. May 31, 2018) (holding that 23(c)(4) "assumes that the action as a whole satisfies the predominance requirement" and rejecting certification of "common" issues); *Atlas Roofing Corp. Chalet Shingle Prod. Liab. Litig.*, 321 F.R.D. 430 (N.D. Ga. 2017) (same); *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 700 (S.D. Fla. 2014) (same). That Providers do not join in this request speaks volumes.

III. PLAINTIFFS' PROPOSAL IS CONTRARY TO APPLICABLE LAW.

A. Plaintiffs' Bifurcation Proposal Would Violate the Seventh Amendment.

Plaintiffs' proposed bifurcation of liability and damages creates an inescapable violation of Defendants' rights under the Seventh Amendment's Reexamination Clause, which prohibits overlapping issues from being reexamined by different juries.

As Plaintiffs admit, bifurcation is unconstitutional "where the damage issue is so interwoven with the other issues that it cannot be submitted to the jury independently of the others without confusion and uncertainty, which would amount to a denial of a fair trial." *Swofford v. B & W, Inc.*, 336 F.2d 406, 415 (5th Cir. 1964) (citations omitted); *see Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) ("unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice," bifurcation is improper); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) ("[T]he judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries."). Issues are not distinct when successive juries will be required to consider factual issues that are common to both trials and essential to the outcome. *See Hoover v. Fla. Hydro, Inc.*, No. 07-1100, 2009 WL 2163128, at *4 (E.D. La. July 16, 2009). That is exactly what would happen here.

Plaintiffs contend that they can solve the problem through a "carefully parsed" proceeding. *See* Pls.' Br. at 22. That is wrong. Taking Plaintiffs at their word, the first trial would include the fact of damages (*i.e.*, to show the existence of antitrust injury by way of proving liability), while the second trial would include the "quantum of damages." But when determining the amount of damages, the second jury would necessarily have to reconsider whether damage occurred in the

first place. That is improper under the Seventh Amendment, as numerous courts have recognized in the antitrust context. *See State of Ala. v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (noting that "in a private antitrust suit there is no neat dividing line between the issue of liability and damages," and further explaining that "bifurcation to separate juries of liability and damages . . . inevitably introduces the possibility that in the liability phase the first jury might find that there was such injury, while the second jury might on the same evidence of injury in the damage phase, find none" (quoting *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 21 (5th Cir. 1974))); *see also In re Indus. Gas Antitrust Litig.*, 100 F.R.D. 280, 303 (N.D. Ill. 1983) (explaining that the potential that bifurcated fact-of-injury and damage inquiries would overlap "is very great; both inquiries concern themselves with the presence of an alleged overcharge; one inquiry is simply a more particularized variant of the other"). Subscribers do not cite a single antitrust decision supporting their claim that bifurcation would be permissible under the Seventh Amendment here. Indeed, none of Plaintiffs' cases grapple with the fact that fact-of-injury and quantum of damages are inextricably interwoven in an antitrust case.[5] That is telling.

[5] Plaintiffs rely on decisions upholding bifurcation in the context of Title VII discrimination claims, *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001), a mass tort action against cigarette manufacturers, *Simon v. Philip Morris Inc.*, 200 F.R.D. 21 (E.D.N.Y. 2001), and a mass tort action against manufacturers of silicone implants, *In re Dow Corning Corp.*, 211 B.R. 545 (Bankr. E.D. Mich. 1997). *See* Pls.' Br. at 23–24.

B. Plaintiffs' Proposed Briefing Schedule Risks Violation of the One-Way Intervention Rule.

Plaintiffs' effort to litigate class certification and all dispositive motions at the same time plainly runs afoul of the rule against one-way intervention.

As one of Plaintiffs' own cases acknowledges, Rule 23(c)(2) exists in part "to protect defendants from unfair 'one-way intervention,' where the members of a class not yet certified can wait for the court's ruling on summary judgment and either opt in to a favorable ruling or avoid being bound by an unfavorable one." *Villa v. San Francisco Forty-Niners,* 104 F. Supp. 3d 1017, 1021 (N.D. Cal. 2015). For this reason, several courts have denied a plaintiff's motion for summary judgment where that motion is made before the court has ruled on plaintiff's motion for class certification, including the one cited by Plaintiffs. *Id.*; *see also Alhassid v. Bank of Am., N.A.*, No. 14-CIV-20484, 2015 WL 11216720, at *1 (S.D. Fla. May 29, 2015); *Cuzco v. Orion Builders, Inc.*, 262 F.R.D. 325, 335 (S.D.N.Y. 2009).

The other cases cited by Plaintiff are not to the contrary. *See* Pls.' Br. at 14. The court in *In re: Disposable Contact Lens Antitrust Litig.*, made summary judgment motions due a year after motions for class certification and ruled on class certification first. *See* 3:15-md-02626-HES-JRK, Dkts. 204, 940 (M.D. Fla.). Plaintiffs' other three cases address the situation—not present here—where the

defendants waived their right to the protections against one-way intervention. *See Corcoran v. CVS Health Corp.*, 4:15-cv-03504-YGR, Dkt. 262 at 3 (N.D. Cal.) (defendants asked court to consider summary judgment motion prior to class certification); *In re Domestic Drywall Antitrust Litig.*, 2:13-md-2437, Dkt. 171 (E.D. Pa.) (parties submitted an agreed schedule setting deadlines on summary judgment only); *Cruz v. Am. Airlines*, 150 F. Supp. 2d 103, 110 (D.D.C. 2001) (noting that plaintiffs, not defendants, "urge[d] the Court to consider their certification motion first," and deciding to address summary judgment motions first because they could "moot" the class certification question). Defendants make no such waiver in this case.

For that reason, if Plaintiffs were to file dispositive motions before the Court has ruled on class certification (as their proposal would require them to do), the Court would either have to deny the motions outright or hold them in abeyance until after deciding class certification and issuing notice to the class. Either way, making the parties brief class certification and dispositive motions at the same time would be a waste of resources.

IV. PROVIDERS' DISCUSSION OF HOSPITAL CLOSURES IS INCORRECT AND IRRELEVANT.

Providers point to a number of articles discussing Alabama hospital closures, and insist that "[a] significant part of the problem . . . is the low reimbursement paid by the local Blue." Provider Pls.' Sub. on Sched., Dkt. 2380 at 2-3. Based on

nothing more than this say-so, Providers contend that it is thus "crucial that at least the hospital portion of the Provider Plaintiffs complete this litigation . . . before many more of them go out of business." *Id.* at 3. These articles are irrelevant to this scheduling motion, and the conclusions that Providers seek to draw from them are incorrect in any event.

Providers ask this Court to resolve a fundamental factual dispute in this case—why (if at all) are Alabama hospitals struggling—through a five-page submission on a scheduling dispute. That is improper. Indeed, as Plaintiffs' own articles show, there are numerous reasons ascribed to Alabama hospital closures[6]—and not one of them is "reimbursements paid by the local Blue." Plaintiffs' attempt to convince the Court to overreach on this point is without merit and should be denied.

CONCLUSION

Defendants respectfully request that the Court adopt Defendants' proposed schedule.

Dated: February 22, 2019

Respectfully submitted,

/s/ Craig A. Hoover

[6] There are also success stories, as reflected in the AL.com article from the same week noting the expansion of Hunstville Hospital. *See* Exhibit 1, Paul Gattis, *Huntsville growth supers growth at Huntsville Hospital*, AL.com (Feb. 13, 2019), https://www.al.com/news/2019/02/huntsville-growth-spurs-growth-at-huntsville-hospital.html.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2019, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Craig A. Hoover
Craig A. Hoover